United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

74-2606

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

GABRIEL MARIN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

RUBIN, GOLD AND GELLER
Attorneys for Defendant-Appellant
299 Broadway
New York, New York
(212) 233-3330

LAWRENCE STERN
of Counsel

(4501B)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CONT.

TABLE OF AUTHORITIES CONT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 74-2606

GABRIEL MARIN, :

Defendant-Appellant. :

ISSUES PRESENTED

1. Whether, because appellant was improperly brought to trial on a single count indictment unsupported by evidence before the grand jury and because he was then tried and convicted on insufficient evidence of an attempt to commit a different crime, and because equivocal instructions permitted a jury verdict on the indicted charge intended to be withheld from the jury, appellant was deprived of his constitutional rights to grand jury indictment and due process of law.

2. Whether remarks by the prosecutor exhorting the jury to keep in mind, while deliberating on the evidence, the government's obligations in this "important case" to enforce the narcotics laws and to do justice by persuading the jury to conviction, and the prosecutor's reference to his own knowledge of the risks taken by the informant, were prejudicial to a fair trial.

3. Whether in a case where entrapment was at issue, where the jury measures government misconduct against defendant predisposition, it was prejudicial to permit the jury to have with them during deliberations the transcripts of appellant's taped conversations.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York [Frankel, J.], rendered on December 2, 1974, convicting appellant of one count of possession of cocaine with intent to distribute and sentencing him to thirty months probation on condition he enroll in Phoenix House.

B. Statement of Facts

Appellant was indicted alone, in one count charging possession of one gram of cocaine with intent to distribute. At trial, the government opened with the following explanations of the indictment and the evidence to support it:

> Something might have struck you amiss when you heard the reading of the indictment, which charges Gabriel Marin with possessing one gram of cocaine... Jose Caicedo... handed four ounces of powdery substance, quinine, starch, something that looks like cocaine, and distributed in that four ounces of starch was one gram of cocaine... Gabriel Marin... did get one gram of cocaine... There is going to be another chemist who is going to testify that he examined the package that was given and picked up, given to and picked up by Gabriel Marin. After he completed his tests he was unable to find any cocaine... We will prove beyond a reasonable doubt that he did possess that cocaine. But even if you find that he didn't, the government has a second contention, and that is simply that Mr. Marin did everything possible to get cocaine. He attempted to violate a law...
> (17-18*)

* Numbered references are to pages in the minutes at trial of November 21, 22, 25, 1974.

Objection to the prosecutor's statement injecting the uncharged attempt into the case was overruled (20).

During the government's case, at the conclusion of the testimony of the major witness, the government informant, Jose Caicedo, the Court announced, outside the jury's presence, its intention to preclude the government from proceeding on the possession theory.

> I'm not going to let the jury find there was cocaine there, because the chemist looked and said he couldn't find any (220)... I may well find that I would not permit a reasonable jury to conclude that enough of that cocaine off the end of that paper clip got in there to be significant. When they control substances, I assume they don't mean the amount that if it were in the air in New York City it wouldn't make anybody high, it wouldn't be noticeable but yet it would dance on the edge of a paper clip... I don't know why we should bother with this (222)... that equivocal position which I frankly find very hard to understand as a rational approach to a theory of crime. Maybe there was enough there but the chemist couldn't see it, and then if there wasn't enough there, and there really was none there, you may convict this man anyhow because we have this alternative view (223)... why they thought they could cook up a crime with a paper clip... If that little stunt with the paper clip should make a difference for purposes of the criminal law, I think something's wrong with the criminal law that we are administering. I don't think agents ought to have it in their power to make that kind of determination affecting a man who after all on everybody's hypothesis doesn't know what he got. He doesn't really

> know what he got... I don't think we want to fabricate the substance of crimes in that organized way... what [the officials] are doing with each other, it ought to make a difference in the criminal liability of this defendant, whether they plant a teaspoonful in there of real cocaine or don't plant any. I find that unacceptable. (225-226)

Despite the above statement and the surrounding colloquy and the goverment's thusly advised election, immediately thereafter, to proceed on the attempt theory, the jury was not instructed on the "correct" theory of the case. In his summation to the jury, the prosecutor stated: "The issues are very clear-cut. They are simply this: Whether Gabriel Marin was found in possession ——— attempted to be in possession of four ounces of cocaine..." (319).

Finally, the Court charged the jury by first reading the indictment which charged that appellant "knowingly possessed, with intent to distribute, a quantity of cocaine." Then the Court charged that the indictment, "rests upon a statute... which says it is a federal crime to possess... cocaine." Then the Court charged,

> you know that it is the government's theory that Mr. Marin attempted to possess cocaine rather than actually possessing it, and that this actual possession was never accomplished.. (320)

The jury was not instructed that they could not find appellant guilty of the possession charged in the indictment. During

their deliberations, the jury presented a note asking, "Is there a law determining to sell by virtue of the quantity in possession?" (357). They were instructed that their question was immaterial. After further deliberations, the jury returned a verdict of "guilty." (370). There was no further explanation of the verdict.

In his opening statement, the prosecutor also told the jury,

> The government's function ... is to persuade you beyond a reasonable doubt that that evidence warrants conviction ... It is not a question of winning, it is a question of doing justice... this is an important case... because it is the obligation of the Drug Enforcement Agency and it's the obligation of the government to see that our narcotics laws are enforced fully, fairly, and equally. You should bear that in mind when you consider the evidence and when you ultimately adjourn for your deliberations. (25-26)

The informant witness, Jose Caicedo, was, at the time of trial, a 19 year old citizen of Columbia. He had been arrested by DEA agents in New Orleans, Louisiana on December 3, 1973, in possession of 6 ounces of cocaine (34-37). Caicedo had lived in the United States previously for three separate periods of 18, 5, and 8 months in 1971 and 1972 (36). He had attended high school in Queens, and, while there, had acted as a go-between, introducing high school students to his friend, Eric, who sold the students cocaine. Caicedo received cocaine and a total of

two or three hundred dollars for his services to Eric. He regularly used marijuana, opium, cocaine, and acid (67-69).

The night before his trial testimony, Caicedo had a conversation with the United States Attorney about his punishment possibilities, but he couldn't recall any more than what the arresting agent had originally told him, in December, 1973, that he'd have to give up a couple of people and make cases against them in order to be allowed to leave the country without a jail term. He had not been indicted as of trial (72-73, 96-97).

Caicedo testified that in Bogota in November, 1973, a woman named Gloria Toro introduced him to Gustavos Santos, who gave Caicedo 6 ounces of cocaine to take and sell in the United States. Toro and Santos directed the operation, ordering Caicedo to sell the cocaine to Carmine Comizio. They did not tell Caicedo to sell it anywhere else, nor did they mention appellant's name (84-86, 139). They cut the cocaine and sewed it into one of his jackets (38-40). Just before leaving for the States, Caicedo stayed at the house of Gina Rosas' mother. While there he asked Gina Rosas if she knew anybody who might buy cocaine in New York. Rosas gave him appellant's name, phone number, and wife's name, and Caicedo wrote this information on a piece of paper. Rosas never asked him anything about the quantity or quality of the cocaine (41-42, 87-90, 112-113). Caicedo took the plane to New Orleans on December 2, planning to

enter customs there and then fly on to New York. He did not have enough money for the flight from New Orleans to New York; he was planning to beg for that money in the New Orleans airport (40,92).

A customs search at the New Orleans airport uncovered the 6 ounces sewn into his jacket. Ron Hall, a DEA agent, was summoned; he told Caicedo that if he "cooperated with the two addresses" found on the pieces of papers in Caicedo's jacket, the judge would be told, and the deal, as above described, would be carried out. Caicedo agreed. From New Orleans he called Bogota to find out where he was supposed to send or bring the money from the sale of the 6 ounces (43-46, 70-71). On the same day he flew with Hall to New York.

Upon arrival in New York, Caicedo telephoned the number on the piece of paper and spoke to appellant's wife who gave him the number of a bar where appellant was employed. (Eric's Restaurant: no relation to the high school drug dealer). Caicedo called the bar and reached appellant. In this first of a total of 30 phone calls placed by Caicedo at the direction of the DEA agents, Caicedo told appellant he had 6 ounces of 80% pure merchandise to sell at $650.00 per ounce. Some of this information was given in response to appellant's questions, and appellant also asked if he and Caicedo had ever met before in Columbia; they had not. Then appellant said, "Okay, before you go to Columbia, I want to send some money to Sergio and a

letter to Gina Rosas her husband." Appellant told Caicedo to come to the bar during his working hours, at 2:00 A.M. (47-52, 100).

Caicedo didn't go to the bar as arranged. Instead he phoned there again on December 5 and arranged to meet appellant there on December 5 at 1:00 P.M. On December 5, Caicedo went to the bar wearing a Kel transmitter and accompanied by an undercover DEA agent named Rafael. While Rafael remained in the car outside the bar, Caicedo went inside and met appellant and someone named "Joe." Appellant asked Caicedo why he had not brought more cocaine with him, and requested a sample. Caicedo went outside and conferred with Rafael about a sample. Rafael said there could be no sample and that he wanted to see the money. Appellant went outside to speak to Rafael who invited him into the car to look at the drugs, but appellant refused. Rafael finally agreed to the sample. He told appellant he would drive away, fix it, and return with it to the bar. He and Caicedo drove away and put the sample in a dollar bill; Rafael arranged with his fellow DEA agents that appellant would be arrested as soon as he had possession of the sample. They drove back to the bar, but appellant was not there (53-58).

The agent and Caicedo returned to DEA headquarters where Caicedo called appellant again to try and get appellant to take the sample (59,120). Appellant explained that he didn't stay for the sample, because Rafael "looks like a cop." (59). Caicedo asked appellant to meet him at 12:30 P.M. on

December 6 at the bar, at which time he would give appellant the sample and Rafael would not be present. Caicedo later cancelled this meeting, because Rafael was present, and left a message that appellant should come to his hotel at 4:00 P.M. on the 6th. Appellant did not come to this meeting (60-62).

Caicedo called appellant again, and they arranged a meeting for 11:00 P.M. that same night on the corner of 57th and 9th Avenue. The agents gave Caicedo a package containing four ounces of powdery substance. When appellant appeared on the corner, Caicedo handed appellant the package so that appellant could be arrested, and he told appellant to pay the next day (63-64, 127-128). Caicedo immediately walked away as Agent Hall came running toward appellant with his gun out (64, 125).

Caicedo testified further that he was always wearing the Kel transmitter, that he heard the tapes and that they accurately reflected the conversations that had occurred, and that the translations, which were made with his assistance, were accurate (65-67, 103-108). He identified the brown bag he had handed to appellant (76), the jacket seized at the New Orleans airport and the piece of paper with appellant's name (204-205).

He heard the tape made of the conversation betweem himself and appellant on the corner of 57th and 9th. Because of the street noise, the words were inaudible (140-141).

Ronald Hall, the DEA agent, was permitted to testify, over objection to the hearsay bolstering of the testimony of Caicedo (145-146), that Caicedo told Hall that the original plan with Toro and Santos was to go on to New York to notify the people whose names were on the pieces of paper (147), specifically, according to Toro's instructions, to notify Carmine Comizio (167). Hall testified that Caicedo did in fact contact Comizio first and sold Comizio one ounce at $650.00 (189-190).

Hall further testified that the DEA agents directed Caicedo's actions after his arrest, that they made the decision to call appellant each time and that it was their plan to sell appellant the six ounces (174, 178, 182). It was Hall who told Caicedo to finally give appellant the package without asking for immediate payment (183).

On December 5, DEA agent Siegel made the dummy package of quinine and starch. He dipped the end of an extended paper clip wire into the original batch of cocaine and deposited the amount that adhered thereto into the dummy package. He did this a few times. There had been no analysis of the "small amount" transferred, although the original batch of six ounces was analyzed to be 93.1% pure cocaine (154-156, 161, 174-176). A chemical analysis of the dummy package resulted in no evidence of cocaine (163).

Over objection that appellant was not charged with, nor connected to, the original 6 ounce batch, that batch of

pure cocaine was received in evidence (156-162).

Agent Hall identified a teletype message sent by Agent Bland, the director of the New Orleans airport branch of the DEA, to New York. The message states, "The defendant Caicedo agreed to assist in a controlled delivery to the alleged recipient, Carmine Comizio." (171).

When Caicedo walked away and appellant was arrested on the corner of 57th and 9th Avenue, Agent Hall did not run, or walk, toward appellant at all, nor did he draw his gun (185).

Rafael Halperin, the DEA agent who was enlisted to accompany Caicedo and deliver the package to appellant, corroborated Caicedo. Appellant refused to take the package and insisted on a sample (190-194).

DEA agent Marvin Siegel explained exactly how he made the dummy package. He had been told that the original batch contained cocaine (227-231).

DEA agent Robert Graham brought appellant to the United States Attorney's office at 12:00 P.M. the day after the arrest. On the way over from West Street, the agent asked appellant to cooperate and told him cooperation could help him. In general, Agent Graham tells people that their cooperation will have an effect on the kind of bail conditions set (239-256). After rights advice in the U.S. Attorney's office, appellant said "Manuel" had called him several times to sell him cocaine, but that appellant would not come

to an agreement because he didn't know "Manuel." He agreed to meet Manuel on December 6, "at which time Manuel brought him four ounces of cocaine," and said he would get two more upon payment for the four (247-248). After appellant refused to sign a statement, he was taken to the magistrate for arraignment (249).

DEA agent Michael Horn interviewed appellant in the DEA office following the arrest. After rights advice, appellant told the agent that he had known Gina Rosas in Columbia and that she supplied cocaine to rock groups who smuggled it into the United States (259-261).

The tapes and transcripts of telephone calls and bar conversations were received in evidence (262-265).

The agent testified that street cocaine to the ultimate customer is 8-16% pure, and that 80% pure cocaine could be cut 7 or 8 times. However, the substance found in appellant's possession could not be cut or distributed (266-271).

There was no recording made of the conversation between Caicedo and appellant on the corner of 57th and 9th Avenue (272-273).

At the close of the government's case, appellant's motion to dismiss was denied, the Court relying on United States v. Heng Awkak Roman, 484 F. 2d 1271 (2d Cir., 1973) cert. den. 94 S. Ct. 1565 (274-278). The Court also ruled that the question of entrapment was for the jury, notwithstanding the evidence of sale by a government agent (279).

The Court also found no basis in the evidence for a charge on the lesser included offense of misdemeanor possession (287-289).

The defense presented no evidence.

During his summation to the jury, the prosecutor argued, without basis in the evidence,

> This, however, doesn't take away from the fact that Jose Caicedo decided to his credit to cooperate with the government in continuing this investigation. At some risk to himself, I would add.
> (320))

Objection was taken to the Court's Heng Roman charge on attempt to do that which could not have occurred, and to the Court's charge on entrapment that

> There is entrapment, then, if a government officer or agent implants in the mind of an innocent person the disposition to commit the offense.
> (345, 346).
> (353-354).

Over objection (215), the jury was given the transcripts of the tapes to review in the jury room during their deliberations (356, 366).

ARGUMENT

Point I

BECAUSE APPELLANT WAS IMPROPERLY BROUGHT TO TRIAL ON A SINGLE COUNT INDICTMENT UNSUPPORTED BY EVIDENCE BEFORE THE GRAND JURY, AND BECAUSE HE WAS THEN TRIED AND CONVICTED ON INSUFFICIENT EVIDENCE OF AN ATTEMPT

TO COMMIT A DIFFERENT CRIME, AND BECAUSE EQUIVOCAL INSTRUCTIONS PERMITTED A JURY VERDICT ON THE INDICTED CHARGE INTENDED TO BE WITHHELD FROM THE JURY, APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO GRAND JURY INDICTMENT AND DUE PROCESS OF LAW.

Without evidence of possession of a controlled substance, without evidence of specific knowledge of what substance he was getting from a government agent, and, thus, without the completely formed intention to commit the crime of which that knowledge was a central ingredient, appellant was wrongfully convicted on an indictment charging him with actual possession of one gram of cocaine. The guilty verdict on this indictment, on the government's evidence as presented at trial, is a deprivation of due process of law for several reasons and from several viewpoints: (1) since there was no evidence that the substance possessed by appellant was controlled, the grand jury indictment for possession of a specific quantity, one gram, of a controlled substance, and for that crime only, was not a true bill and could not initiate a trial on any offenses lesser included or co-equal; (2) since this was trial by a jury on an indictment charging actual possession of one gram of cocaine where, concededly, there was no evidence of actual possession, and since the jury was never instructed to disregard the charge as worded in the indictment, and since the judge did not strike or amend the wording of the indictment, a general verdict of

guilty may have been for that charge rather than the attempt. And, since the government's theory of the attempt involved possession of four ounces of cocaine, this was not an attempt to commit the offense charged, i.e. possession of one gram of cocaine; (3) since at the time of his arrest in possession of starch, appellant did not know what he had and did not have a completely formed belief in his own mind that it was cocaine and cocaine of sufficient strength and quality to be distributed, i.e., since his own intentions and beliefs about the surrounding circumstances were themselves inchoate at the time of arrest, he could not be found guilty of criminal attempt; (4) since government agents sold him the substance after altering it and altering the course of the supposed pre-planned transaction, and since they hounded appellant into holding it for the few seconds necessary for an arrest, entrapment was proved as a matter of law; and (5) if the government was entitled to have the jury instructed on a co-equal offense not specifically charged, appellant should have been entitled to a charge on misdemeanor possession of a substance which he could not ultimately have distributed.

After the testimony of the government's main witness, the trial judge concluded that there was no evidence to support the only charge in the indictment, i.e. actual possession of one gram of cocaine, and he ruled that the government could not proceed to the jury on the theory of the indictment. The government chemist had analysed the

substance possessed by appellant and found it to be drug free. The Court concluded that even if there were some small tracings, the amount would be insignificant for the purposes of the law. Turner v. United States, 396 U.S. 398, 423 (1970); United States v. Vallejo, 312 F. Supp. 244 (D.C.N.Y.) off'd 438 F. 2d 663; Diaz-Rosendo v. United States, 364 F. 2d 941, 944 (9th Cir., 1966). As the Court below stated it,

> I'm not going to let the jury find there was cocaine there, because the chemist looked and said he couldn't find any
>
> (220)
>
> I may well find that I would not permit a reasonable jury to conclude that enough of that cocaine off the end of that paper clip got in there to be significant. When they control substances, I assume they don't mean the amount that if it were in the air in New York City it wouldn't make anybody high, it wouldn't be noticeable but yet it would dance on the edge of a paper clip... I don't know why we should bother with this.
>
> (222)

We submit that since no more evidence was presented to the grand jury than that which prompted the Court's finding even before the conclusion of the government's case, the grand jury could not have had sufficient evidence before it to indict for the crime of actual possession of a controlled substance. Notwithstanding the possibility that the evidence made out the crime of attempted possession (and we argue infra that it did not), the grand jury did not choose to indict for attempted possession; it chose to indict for a

specific completed crime, possession of a specific quantity of a controlled substance, for which, however, there was no evidence. We submit that for an indictment to confer valid jurisdiction, there must be evidence to support the stated charge therein, before a petit jury can proceed to find guilt of a lesser included or co-equal offense. Thus, in United States v. Heng Awkak Roman, 484 F. 2d 1271 (2d Cir., 1973) cert. den. 94 S. Ct. 1565, relying on opinion at 356 F. Supp. 434 (D.C.N.Y., 1973), although there was no evidence of actual possession as charged in the substantive count, the indictment also included a separate conspiracy count obviously founded on some evidence. The Court had jurisdiction to proceed on that count and on any theories of constructive possession developed by the relationship between the conspiracy and substantive counts, regardless of the ultimate legal decision as to the validity of that relationship. Similarly, in Simpson v. United States, 195 F. 2d 721 (9th Cir., 1952), whereas the indictment charged only substantive possession and a verdict of guilt of attempted possession was upheld under Rule 31(c), there was never any question of the sufficiency of the evidence before the grand jury to support some theory of the constructive possession as charged (i.e., by virtue of the claim ticket in the defendant's possession). In none of these cases (See also United States v. Tropiano, 418 F. 2d 1069 (3d Cir., 1969) cert. den. 397 U.S. 1021; Small v. United States, 153 F. 2d 144 (9th Cir., 1946) cert. den. 328 U.S. 838), did

the trial judge, as here, make a determination that the specific charge in the indictment itself was totally unsupported by evidence of that crime as charged. And, we are arguing here that a pre-requisite to any jury's finding of guilt on a lesser or co-equal offense, is that the court first be empowered to proceed on a proper indictment supported by some evidence of the charge as charged.

> if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed.
> United States v. Costello, 221 F. 2d 668, 677 (2d Cir., 1955) aff'd 350 U.S. 357.

Furthermore, since in the peculiar context of this case, the grand jury chose to indict in terms of a completed crime rather than on attempt, when in this case attempt presented the "esoteric questions" of the impossibility of the completed crime (United States v. Roman, supra at 272), in addition to the issue of appellant's beliefs about the surrounding circumstances, it is probable that the grand jury did not consider the attempt in the specific terms of the indictment and did not consider evidence on the essential and sui generis elements of impossibility and appellant's beliefs at the time of the crime (see infra). United States v. Birrell, 447 F. 2d 1168 (2d Cir., 1971) cert. den. 404 U.S. 1025; United States v. Fistel, 460 F. 2d 157 (2d Cir., 1972).*

* If the chemist's report was received by the United States Attorney after the return of the indictment, he had an obligation to resubmit to the grand jury.

Nor, could the charge of attempted possession of four ounces of cocaine be contemplated in a charge of actual possession of one gram of cocaine. The attempt, if one was contemplated by the grand jury, was the attempt to commit the offense as charged in the indictment, the possession of the one gram. Thus, the indictment in this case, failed for lack of evidence of the charge as stated therein, was also insufficient to support a trial and verdict on the completely different charge, not co-equal or subsumed or contemplated by the grand jury, of attempt to possess a larger and different quantity of cocaine.

If the indictment itself is to be held well-founded for the purpose of initiating the instant trial, then the conviction must fail because it is quite possible that the trial jury reached a verdict of guilty of the actual possession, for which, concededly, there was no evidence. This is a real possibility because they were never clearly instructed to disregard that charge (indeed, the indictment was read to them in the Court's final charge), and because their one word verdict "guilty" did not proclaim of which crime. The jury was told during the government's opening statement that the proof would show beyond a reasonable doubt that appellant possessed cocaine, and that he possessed it despite the chemist's report to the contrary. In his final summation, the prosecutor was still confused when he told the jury that the issue was whether appellant "was found in possession ——— attempted to be in possession of four

ounces of cocaine" (319). And, although the Court had determined in the beginning of the trial that the possession charge could not be submitted to the jury, he made that determination outside the jury's presence and never instructed them about it until his final charge. But, even in his final charge he failed to tell them unequivocally that the charge of possession was stricken from their consideration. He did tell them that the government's theory was now that the "actual possession was never accomplished" (320), but alongside this instruction he read the indictment which charged the actual possession. Finally, the jury was still concerned with actual possession, albeit to the extent it bore on intention to distribute, when they requested instruction on whether the law gave some guidance as to the quantity possessed for distribution purposes.

Where more than one theory of the case is submitted to the jury, deliberately or inadvertently, the return of a general verdict is ambiguous and cannot stand. Glenn v. United States, 420 F. 2d 1323 (D.C. Cir., 1969). In this case the verdict may have rested on a theory ruled by the trial judge to be unsupported by evidence, since equivocal or contradictory instructions on that ruling were presented to the jury. Bollenbach v. United States, 326 U.S. 607 (1946); United States v. Christman, 298 F. 2d 651 (2d Cir., 1962); Gagliardo v. United States, 366 F. 2d 720 (9th Cir., 1966).

Even if the jury was finding guilt of the attempted possession of four ounces of cocaine, that verdict is not sustainable under the indictment and not sustained by the evidence. Federal Rule 31(c) states,

> The defendant may be found guilty
> . . . of an attempt to commit
> . . . the offense charged. . . .

The "offense charged" here is possession of one gram of cocaine. Since the evidence failed to show actual possession of that one gram, any possible attempt theory would be bounded by the terms of the indictment. To the extent that the jury was instructed on an attempt theory of four ounces, they were instructed on charges outside the indictment and the verdict must fall. See United States v. Cioffi, 487 F. 2d 492 (2d Cir., 1973).

Furthermore, attempted possession of four ounces of cocaine is not supported by the evidence. There is no evidence that appellant knew or believed he was actually getting cocaine or that he was getting cocaine of sufficient potency for distribution. Caicedo told appellant that it was cocaine of 80% purity, but appellant throughout 30 phone calls and several meetings refused to accept that declaration and refused to take the substance unless he was provided with a sample, and even when a sample was arranged, he balked because he had suspicions that Caicedo was dealing through undercover agents. Thus, when appellant finally met Caicedo on the street corner on December 6, appellant thought he was

merely going to get a sample of some substance which Caicedo, whom he did not know and whom he did not trust, was trying to sell as cocaine. Even though Caicedo skipped the sample and pressed four ounces of this substance into appellant's hands, appellant's intention at that moment, the moment of the crime as charged, was to find out what he had before he could do anything with it. Of course, had he had the opportunity to test the harmless substance, any general and inchoate intentions to sell cocaine would have been dissipated with respect to the subject of these charges; the yet unformed intention to possess to sell whatever substance was in Caicedo's package never had the opportunity to take a completed shape for the purposes of the law of attempt. As the trial judge himself recognized, appellant was, "a man who after all on everybody's hypothesis doesn't know what he got. He doesn't really know what he got." (225).

Thus, in the absence of actual knowledge on the part of appellant, the requisite mens rea for the commission of a criminal act, be that a completed act or an attempted act, is absent.

> one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the 'criminal intent,' necessary to guilt.
>
> United States v. Crimmins, 123 F. 2d 271, 272 (2d Cir., 1941).

Indeed, this Court has required a higher quantum of specific knowledge and intent when the charge involves inchoate crime: "where a specific intent is required, in an attempt or conspiracy count, the proper charge requires that the element of actual knowledge be found by the jury." United States v. Cangiano, 491 F. 2d 906, 910 (2d Cir., 1974). The reason for this, of course, is to avoid holding a man guilty of crime when, not only was there no completed criminal act on his part, there was no completed criminal intent on his part. Although the crime itself need not have been completed, the intention, which comes from full knowledge of the circumstances, must have been completed. While inchoate actions may be punished, inchoate intentions may not be, because this reaches too far into a man's mind and too far away from the accomplishment of any criminal act. United States v. Coplon, 185 F. 2d 629, 633 (2d Cir., 1950).

It is in this respect that the instant case differs from United States v. Heng Roman, supra. There, the defendants were the original source of the real heroin. As the suppliers of the drugs, they had a full and completed mens rea with respect to the package they ultimately possessed. As far as they were concerned, they knew for certain that heroin was contained therein and that it was of sufficient strength for distribution, and that they would in fact distribute it. In the words of the trial judge adopted by this Court, "the defendants' actions would have constituted

the completed crime if the surrounding circumstances were as they believed them to be ...." 356 F. Supp. 434 at 437.

But, the surrounding circumstances as appellant believed them to be in this case are, at the least, vague. Maybe Caicedo was handing him cocaine and maybe starch. Appellant had absolutely no way of knowing at the time of the crime, and the evidence is clear that he was always suspicious. Thus appellant's specific intent at the time of the crime was not the specific intent necessary to the guilt of attempt to commit a "factually" impossible crime. At the time of the transfer his specific intent, at best, was to possess what Caicedo had given him in order to test it. The inchoate and possible future intention of selling it if it turned out to be saleable cocaine may not be the subject of criminal punishment. To be guilty at the time of the crime appellant must have believed for certain that the package contained cocaine. United States v. Roman, supra.

> the criminal intent and the criminal act must concur in point of time. 'An act done without criminal intent does not become a crime by virtue of the fact that the defendant thereafter had the necessary intent.' 1 Wharton's Criminal Law and Procedure (1957 ed.) §63, pp.139,140.
>
> Gay v. United States, 408 F. 2d 923, 931 (8th Cir., 1969) cert. den. 396 U.S. 823

It may not be argued that appellant was possessed of the specific intent to distribute the substance handed him by Caicedo, because that intent could not have been

found until the belief crystallized in him that he was possessed of distributable cocaine. And, that crystallization of intent could not have occurred until he had taken the substance somewhere and tested it. And, furthermore, it could never have occurred in this case because the substance was not cocaine. Indeed, the closest possible inchoate intention attributable to appellant at the time of the crime was the bare intention to possess whatever Caicedo was giving him. Since upon investigation he would have discovered it undistributable, he never could have formed the intention to distribute and was entitled to at least a jury charge on misdemeanor possession and, at most in this case, a verdict of guilt of the same. United States v. Blake, 484 F. 2d 50 (8th Cir., 1973); United States v. Young, 464 F. 2d 160 (5th Cir., 1972); Sansone v. United States , 380 U.S. 343 (1965).

A verdict of guilt of attempt in this case is a verdict on speculation about what might have happened had real cocaine been in that package all along; there was no such speculation about that in Heng Roman, because the evidence in that case presented clear knowledge and intention on the part of the defendants. The agreements were fully formed. In this case, a jury is left to speculate only, that appellant and Caicedo would have reached agreement over the price, quantity, and quality, after the sample had been exchanged. From the evidence, it is equally possible that no such agreement would have occurred, and it is certain that, absent the

government's direction of the operation, Caicedo would never have pressed four ounces of cocaine into appellant's hands for free.*

This raises an additional bar to appellant's conviction: he was entrapped into handling the package for the few seconds necessary to an arrest, after his repeated expressions of unwillingness due to suspicions about Caicedo and the merchandise. Whatever appellant's motivations for refusing the deal again and again, he did refuse to engage in the very act the government agents were seeking to get him to commit. Whatever general and prior disposition appellant may have had, the evidence on this particular transaction is that the government wouldn't take "no" for an answer. The government had decided to sell drugs to this man whose name appeared on a piece of paper in the possession of the informant, and that was all there was to it. It must be noted (1) that appellant was not involved in this transaction from the beginning; he was not expecting Caicedo or the cocaine; he had never agreed, prior to government intervention and manipulation of the events, to buy cocaine from Caicedo or anyone else; he was

---

* Appellant also preserves his objections to this conviction on the due process Constitutional grounds that the possession of an uncontrolled substance is not a crime and that no man may be punished for thought processes alone and that the law of attempts is unconstitutionally applied in this case and that Heng Roman is wrongly decided. United States v. Berrigan, 482 F. 2d 171 (3rd Cir., 1973); Rosado v. Martinez, 369 F. Supp. 477 (D.C.P.R., 1974); United States v. Hair, 356 F. Supp. 39 (D.C.D.C., 1973); People v. Jaffe, 185 N.Y. 497 (1906).

not responsible for the events in Bogota where someone outside his control merely gave his name as someone in New York who might buy cocaine, and (2) this was a direct sale of supposed controlled substances by the government. In the first place, appellant was not ready and willing "without persuasion" from the government agent, persuasion to such an extent that the government finally had to resort to putting the stuff into his hands to make the arrest, (United States v. Viviano, 437 F. 2d 295, 298, 299 n.2 (2d Cir., 1971) cert. den. 402 U.S. 983), and in the second place, because of the potential for abuse in the direct sale by the government of controlled substances, (United States v. Mosley, 496 F. 2d 1012 (5th Cir., 1974); United States v. Oquendo, 490 F. 2d 161 (5th Cir., 1974)), this was a case of entrapment as a matter of law. Once again, as the trial judge himself stated it,

> why they thought they could cook up a crime with a paper clip... If that little stunt with the paper clip should make a difference for purposes of the criminal law, I think something's wrong with the criminal law that we are administering. I don't think agents ought to have it in their power to make that kind of determination... I don't think we want to fabricate the substance of crimes in that organized way.....
>
> (225-226)

The paper clip stunt was a fabrication of crime just as was the putting of the package into appellant's hands, and this kind of activity, if given this Court's imprimatur,

empowers the government to incriminate whom it chooses, even after its initial investments of time and effort have failed, by tactics designed to hound and ensnare into the barest literal circumstances of a criminal act.

Finally, appellant preserves his objection to the Court's charge to the jury on this subject, that the defense of entrapment was available only to an "innocent person." (345, 346, 353-354). Besides being vague as to what crimes the word "innocent" refers, whether the defendant must be innocent of the crimes charged or innocent of all crime in his past, it gives the erroneous impression that the defense of entrapment is never available to one who has committed the same kind of offense; as such, it is reversible error. United States v. Meade, 491 F. 2d 592 (3rd Cir., 1974).

POINT II

REMARKS BY THE PROSECUTOR EXHORTING THE JURY TO KEEP IN MIND, WHILE DELIBERATING ON THE EVIDENCE, THE GOVERNMENT'S OBLIGATIONS IN THIS "IMPORTANT CASE" TO ENFORCE THE NARCOTICS LAWS AND TO DO JUSTICE BY PERSUADING THE JURY TO CONVICTION, AND THE PROSECUTOR'S REFERENCE TO HIS OWN KNOWLEDGE OF THE RISKS TAKEN BY THE INFORMANT, WERE PREJUDICIAL TO A FAIR TRIAL.

In his opening statement to the jury, the prosecutor instructed the jury that the motive and function of his office and of the DEA, whose agents gave considerable testimony in the case, was to fully enforce the narcotics

laws and to do justice by persuading the jury in this "important" case that appellant was guilty beyond a reasonable doubt, and that these motives should influence the jury in their deliberations. He said,

> The government's function... is to persuade you beyond a reasonable doubt that that evidence warrants conviction... It is not a question of winning, it is a question of doing justice... this is an important case... because it is the obligation of the Drug Enforcement Agency and it's the obligation of the government to see that our narcotics laws are enforced fully, fairly, and equally. You should bear that in mind when you consider the evidence and when you ultimately adjourn for your deliberations. (25-26)

We submit that this was an appeal to the jury to consider that justice and the public interest were on the side of conviction in this case because the DEA and the government were prosecuting the case, and, as the chief enforcers and protectors of the public interest, the belief of these agencies in appellant's guilt should influence the jury's verdict. The jury was, in effect, being exhorted to help these agencies enforce the narcotics laws by bringing in a guilty verdict. They were asked to, "bear that in mind when you consider the evidence and when you ultimately adjourn for your deliberations." This was clearly the prohibited prosecutorial pollutant of attaching the weight of the government to the credibility and quantum of the evidence, to influence the jury away from an objective and dispassionate

review of that evidence. United States v. Fullmer, 457 F. 2d 447 (7th Cir., 1972); Ross v. United States, 180 F. 2d 160 (6th Cir., 1950); United States v. Drummond, 481 F. 2d 62 (2d Cir., 1973); cf. United States v. D'Anna, 450 F. 2d 1201, 1206 (2d Cir., 1971).

Compounding these prejudicial remarks, the prosecutor told the jury, without basis in the evidence, that the government informant, Caicedo, had decided to cooperate with the government, "at some risk to himself." (320). The jury was thus led to infer that appellant, the only defendant on trial, had threatened or would have threatened the physical well-being of Caicedo, and that the prosecutor had some private knowledge of this fact. If this wasn't damning enough in itself, it was an easy step toward the jury's inference that the prosecutor, especially in view of his earlier remarks, had private knowledge of appellant's guilt. United States v. Pepe, 247 F. 2d 838 (2d Cir., 1957); Hall v. United States, 419 F. 2d 582 (5th Cir., 1969); McMillan v. United States, 363 F. 2d 165 (5th Cir., 1966); Dunn v. United States, 307 F. 2d 883 (5th Cir., 1962).

Although no objection was taken to these remarks, their cumulative effect in view of the confused and strained nature of the government's case against appellant (see Point I, supra), should be recognized by this Court as plain error having deprived appellant of a fair trial.

POINT III

IN A CASE WHERE ENTRAPMENT WAS AT ISSUE, WHERE THE JURY MEASURES GOVERNMENT MISCONDUCT AGAINST DEFENDANT PREDISPOSITION, IT WAS PREJUDICIAL TO PERMIT THE JURY TO HAVE WITH THEM DURING DELIBERATIONS THE TRANSCRIPTS OF APPELLANT'S TAPED CONVERSATIONS. ALSO, THE DISPLAY OF 6 OUNCES OF COCAINE UNCONNECTED TO APPELLANT DEPRIVED HIM OF A FAIR TRIAL.

Over objection, the jury was permitted to take the transcripts of the taped conversations containing appellant's statements and admissions into the jury room during their deliberations. This allowed them to have in front of them, in writing, what was in effect appellant's own testimony against himself on the subject of his general predisposition to commit the crimes charged and uncharged (See Point I, supra). Notwithstanding this Court's decisions permitting tape transcripts in the jury room (United States v. Carson, 464 F. 2d 424 (2d Cir., 1972); United States v. Koska, 443 F. 2d 1167 (2d Cir., 1971) cert. den. 404 U.S. 852), prejudice occurred in this case because an overweighted emphasis was given to only one side of the entrapment issue, appellant's predisposition. This Court has said that a general predisposition does not negate the defense of entrapment when there has been dogged government overbearance in the creation of the specific crime charged, especially where the defendant has exhibited some reluctance with respect to the specific crime charged. United States v. Viviano, supra; Point I, supra. The jury in this case had

before it in the jury room only written testimony on appellant's predisposition and none of the testimony of the government witnesses describing their course of conduct over days and phone calls and missed meetings and, finally, their last desperate act of placing the package in appellant's hands for the purpose of arrest. When the jury expressed interest in those conversations, fairness to the defense required, at the least, that the conversations be read to them by the stenographer, as is done with all other testimony. Ideally, of course, in addition, portions of the testimonies of Caicedo and Hall, and the other agents, should have been read to balance the reading of the transcripts. To do what was done here, i.e. to allow the jury to mull over the written testimony of appellant only, was similar to giving the jury only the written direct examination of a witness without relevant clarifying cross-examination, or to allowing the jury to hear only part of a statement without permitting the complete statement to come into evidence. These errors are clearly reversible and require a new trial in this case.

Finally, appellant's right to a fair trial on evidence of the crimes charged, which concededly involved no evidence of possession of drugs on his part, was prejudiced by the admission, in evidence, over objection, of the 6 ounces of actual cocaine brought into the country by Caicedo. This was the same kind of prosecutorial effort at prejudice

condemned in United States v. Falley, 489 F. 2d 33 (2d Cir., 1973), i.e., where no drugs are chargeable to the possession of the defendant other drugs are carted into court for the obvious effect of all that white powder on the jury, and some tenuous connection is offered as justification. No connection is shown here. If one is available, in the fact of the prior testimony of Caicedo about the 6 ounces, that background testimony for the sake of completeness, does not justify the admission of the actual drugs.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR, ALTERNATIVELY, A NEW TRIAL ORDERED.

Respectfully submitted,

RUBIN, GOLD, AND GELLER
Attorneys for Appellant
299 Broadway
New York, New York
(212) 233-3330

LAWRENCE STERN
Of Counsel

Received 2 copies of the within

Brief for Defendant-Appellant

this 21 day of Dec., 1925.

Sign John L. Boyle

For: Paul J. Curran Esq(s).

Att'ys for Appellee